

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Gerald K. Smith, as Plan) No. 01-CV-218-PHX-PGR
Trustee for an on behalf of)
the Estates of Boston Chicken,) 01-CV-246
Inc., et. al,) (Consolidated)
Plaintiff,) ORDER
vs.)
Arthur Andersen L.L.P., et.)
al,)
Defendant.)

Pending before this Court are (1) defendant Arthur Andersen's Motion to Dismiss Counts VIII, IX, X, XI and XII (Doc. 44) of plaintiff's Complaint; (2) defendant Deutsche Banc Securities/Alex Brown's, (hereinafter Alex Brown) Motion to Dismiss Counts XVIII and XIX (Doc. 51) of the Complaint; (3) all defendants' Motion to Dismiss (Doc. 56) Counts I, II, III, IV, VIII, IX, X, XI, XIV, XV, XVI and XVII of the Complaint on statute of limitations grounds; (4) defendants Beck, Nadhir and Stephens (hereinafter the Individual Defendants) Motion to Dismiss (Doc. 58) Counts I, II, III, IV, V, VI, and VII of the Complaint; (5) defendants' Merrill Lynch & Co, Merrill Lynch,

1 Pierce, Fenner & Smith, and Morgan Stanley & Company's
2 (hereinafter the Underwriter Defendants) Motion to Dismiss Counts
3 XIV, XV, XVI, and XVII (Doc. 57) and; (6) defendant Bell, Boyd &
4 Lloyd's Motion to Dismiss Counts I and II.

5 **PROCEDURAL HISTORY**

6 On October 5, 1998, Boston Chicken filed for protection
7 under 11 U.S.C. § 1101, *et seq.*

8 On August 17, 2001, the Complaint of Gerald Smith, Plan
9 Trustee was filed on behalf of the Estates of Boston Chicken, BC
10 Real Estate Investments and all Boston Chicken Affiliates
11 (hereinafter collectively referred to as Boston Chicken, unless
12 otherwise noted).¹ The Complaint names the following individuals
13 and entities as defendants; Arthur Andersen, Scott Beck, Saad
14 Nadhir, Mark Stephens, Merrill Lynch & Co., Merrill Lynch,
15 Pierce, Fenner & Smith, Deutsche Banc Securities, Inc. d/b/a
16 Deutsche Banc, Alex Brown and Morgan Stanley & Company. The 132
17 page Complaint asserts nineteen Counts against the aforementioned
18 defendants. The Counts are alleged as follows:

- 19 1. Count I - breach of fiduciary duty, as against the
Individual Defendants;
- 20 2. Count II - aiding and abetting breach of fiduciary
duty, as against the Individual Defendants;
- 21 3. Count III - acting in concert, as against the
Individual Defendants;
- 22 4. Count IV - negligent misrepresentation, as against
the Individual Defendants;
- 23 5. Count V - fraudulent transfer/fraudulent
conveyance, as against Nadhir and Beck;
- 24 6. Count VI - fraudulent transfer as against Nadhir
and Beck;
- 25 7. Count VII - preferential transfer, as against
Nadhir and Beck;

27 ¹ As Plan Trustee, Smith is empowered to commence this action on behalf
28 of Boston Chicken pursuant to Articles IV.B and IV.J of Boston Chicken's Third
Amended Plan, filed on May 3, 2000 and confirmed on May 15, 2000.

- 1 8. Count VIII - aiding and abetting breach of
- 2 fiduciary duty, as against Arthur Andersen;
- 3 9. Count IX - acting in concert, as against Arthur
- 4 Andersen;
- 5 10. Count X - professional malpractice/negligence, as
- 6 against Arthur Andersen;
- 7 11. Count XI - negligent misrepresentation, as against
- 8 Arthur Andersen;
- 9 12. Count XII - breach of contract, as against Arthur
- 10 Andersen;
- 11 13. Count XII - preferential transfer, as against
- 12 Arthur Andersen;
- 13 14. Count XIV - aiding and abetting breach of
- fiduciary duty, as against the Underwriter
- Defendants;
15. Count - XV - acting in concert, as against the
- Underwriter Defendants;
16. Count XVI - negligence, as against, the
- Underwriter Defendants;
17. Count XVII - negligent misrepresentation, as
- against the Underwriter Defendants
18. Count XVIII - fraudulent transfer/fraudulent
- concealment as against Alex Brown;
19. Count XIX - preferential transfer, as against Alex
- Brown.

14 In general, the Complaint alleges that each of the

15 Individual Defendants were officers and/or directors of Boston

16 Chicken who, by virtue of their high-ranking positions and equity

17 positions in Boston Chicken, were capable of influencing and did

18 influence the corporate governance of Boston Chicken, including

19 certain affiliated companies. The Complaint alleges that with

20 the substantial assistance of the Professional Defendants, each

21 of the Individual Defendants breached their fiduciary duties of

22 care, loyalty and candor to Boston Chicken by, among other

23 things, distorting the true financial condition of Boston Chicken

24 and by making material misrepresentations to, and/or concealing

25 material information from, Boston Chicken's shareholders, outside

26 directors, the Securities and Exchange Commission (SEC),

27 creditors and the general public. The Complaint alleges that all

28 defendants created a plan and scheme to create the illusion of

1 growth and prosperity and to conceal their own mismanagement and
2 misconduct.

3 Pursuant to Federal Rule of Civil Procedure 12(b),
4 defendants have filed several Motions to Dismiss various Counts
5 of the Complaint.

6 **FACTUAL BACKGROUND**

7 Boston Chicken started as a rotisserie-chicken chain in
8 Newton, Massachusetts in 1985. The first Boston Chicken store
9 was opened in Newtonville, Massachusetts by Stephen Kolow and
10 Arthur Cores. Kolow and Cores sold their rights to the recipe,
11 name, and concept to George Naddaff, who opened 33 Boston area
12 restaurants.

13 In transactions from late 1991 to early 1992, Naddaff sold
14 his interest in the business to a group of investors led by Beck
15 and Nadhir. Beck became Boston Chicken's Chairman and Chief
16 Executive Officer. Nadhir became Boston Chicken's Vice Chairman.

17 Upon acquiring their interests in Boston Chicken, the
18 Individual Defendants relied on the Area Developers to saturate
19 certain geographically defined markets with Boston Chicken stores
20 and (beginning in 1995) Boston Market stores. As of December 28,
21 1997, the Boston Chicken system included 1,166 stores located in
22 38 states and the District of Columbia, 847 of which were owned
23 by Area Developers financed in part by Boston Chicken, 307 of
24 which were owned by Boston Chicken or its subsidiaries, and 12 of
25 which were owned by other franchisees.

26 The Complaint alleges that the majority of the Area
27 Developers' financing came directly from Boston Chicken in the
28 form of hundreds of millions of dollars in loans. Area

1 Developers financed by Boston Chicken were referred to as
2 financed area developers (hereinafter FADs). Boston Chicken's
3 loan agreements with the Area Developers gave Boston Chicken the
4 right to convert the loans to a controlling equity interest in
5 the FADs. The Individual Defendants planned to exercise an
6 option to take the majority control of each FAD in the event that
7 it became profitable, thus ensuring that only the profitable
8 entities would be reflected in Boston Chicken's financial
9 statements.

10 The Complaint further alleges that the FADs were set up as
11 separate entities, but in actuality they were always controlled
12 by Boston Chicken. The FAD system created the "illusion" of
13 escalating earnings by enabling Boston Chicken to conceal the
14 massive franchise store losses by reflecting them on the
15 financial statements of the FADs and not on the financial
16 statements of Boston Chicken. As the FADs were purportedly
17 organized as private companies, the financial condition of the
18 FADs were not publically disclosed.

19 The Complaint alleges that in order to fairly present Boston
20 Chicken's financial condition, the results of the Area
21 Developers, including the FADs, should, at all times, have been
22 consolidated with Boston Chicken's reported financial results,
23 or, at a minimum, disclosed in Boston Chicken's SEC filings.
24 This failure to disclose also permitted Boston Chicken to
25 artificially inflate their share price and enabled it to raise
26 the cash necessary to sustain the FADs despite their ongoing
27 losses.

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1 More specifically, the FAD system was designed by the
2 Individual Defendants among other things: (a) to remove from
3 Boston Chicken's consolidated financial results the stores owned
4 by the FADs, since these entities were not technically
5 subsidiaries for Boston Chicken, meaning that the enormous losses
6 these entities were incurring would not be reflected in Boston
7 Chicken's reported financial results; (b) to reacquire the
8 franchises if and when they became profitable, thus improving
9 earnings without having to ever show the losses occurring during
10 the start-up phase; (c) to conceal the operating losses of the
11 FADs to create the false impression that Boston Chicken's store
12 operations were successful and profitable and that Boston
13 Chicken's prospects were extremely favorable as the expansion was
14 leading to better and better earnings; (d) to report fictitious
15 franchise fees from the FADs, the source of the money being
16 provided to the franchisees by Boston Chicken itself, which
17 allowed the individual Defendants to overstate and inflate Boston
18 Chicken's reported revenues and earnings; (e) to represent that
19 the Boston Market "concept" was successful and was capable of
20 continuing its huge growth; and (f) to raise more than \$800
21 million from the sale of securities to the public, allowing
22 Boston Chicken to loan more and more money to the FADs to
23 increase its apparent growth rate even more.

24 Boston Chicken claims that they made convertible and non-
25 convertible loans to its FADs to partially finance store
26 development and working capital needs. Boston Chicken also
27 provided to certain FADs various equipment and real estate
28 leasing programs. These loan agreements provided for a revolving

1 loan, with advances permitted during a two or three year draw
2 period, or additional draw period in the event of a loan
3 amendment, in a predetermined maximum amount equal to three to
4 four times the amount of the FADs contributed capital.

5 Apparently, the loans were typically convertible into a
6 majority of equity interest in the FADs after the expiration of a
7 moratorium period, provided that the FAD had completed not less
8 than 80% of its area development commitment, or in the event of
9 certain loan defaults.

10 These loans were convertible at a conversion price set forth
11 in the loan agreement, which price was at a premium over the per-
12 unit price paid by investors in the FADs for their equity
13 investments.

14 In addition, the Area Developers, including the FADs, were
15 then required to pay a development fee of \$5,000.00 per store in
16 addition to a \$35,000.00 franchise fee required by the franchise
17 agreement. The Area Developers, including the FADs, were also
18 subject to a 5% royalty on net revenue (gross revenue minus
19 sales/service taxes, customer refunds and coupons, and the
20 portion of employee meals not charged to the employee), a 2%
21 national advertising fund contribution, a 4 % local advertising
22 fund contribution and a \$10,000.00 grand opening expenditure.
23 These percentage payments paid to Boston Chicken by the Area
24 Developers and the FADs were recorded as revenue on Boston
25 Chicken's income statement. These royalties, franchise related
26 fees and interest income from the Area Developers and the FADs
27 comprised the substantial portion of Boston Chicken's revenues
28 each year.

1 However, the Complaint alleges that the royalties, franchise
2 related fees, and interest income were omitted from any public
3 disclosures. All of these monies, paid by the FADs, were
4 substantially financed by loans to the FADs from Boston Chicken
5 itself. Simply stated, it was never disclosed that Boston
6 Chicken's revenues were being paid out of the proceeds of loans
7 Boston Chicken made to the FADs.

8 The Complaint claims that, because Boston Chicken was
9 lending money to substantially all of the FADs, most of whom
10 experienced operating losses every year, such lending should have
11 been carefully analyzed to determine what portion of Boston
12 Chicken's outstanding receivables would not be collected at any
13 given time in the future. This analysis is important to Boston
14 Chicken because it directly affected the generation of Boston
15 Chicken's revenues. If the Area Developers, including the FADs,
16 failed to pay, Boston Chicken's revenues would be reduced.

17 Boston Chicken's largest asset was the notes receivable from
18 the financing provided to the FADs. Despite the ever increasing
19 and ongoing losses being suffered by the FADs, which greatly
20 compromised the FADs' ability to pay on the notes receivable, the
21 Individual Defendants included the notes receivable as assets on
22 Boston Chicken's balance sheet but failed to establish, prior to
23 the fourth quarter of 1997, an allowance for loan losses for
24 these notes and failed to disclose the material risk that several
25 of the FADs might be unable to continue paying on the notes.

26 The Complaint asserts that historically, Boston Chicken's
27 allowance for loan losses was zero. The Individual Defendants
28 made absolutely no provision for known or probable loan losses on

1 notes receivable from the FADs from 1992 through 1996. By its
2 very nature, Boston Chicken acted as a bank, and as such,
3 required an allowance for loan losses sufficient to absorb losses
4 inherent in the notes receivable from the FADs. This was
5 particularly important given that the FADs were being financed by
6 Boston Chicken and Boston Chicken's revenues were dependant on
7 the FADs repaying the loans made by Boston Chicken. The
8 Complaint further alleges that even with outstanding receivables
9 to the FADs in the hundreds of millions of dollars prior to 1997,
10 the allowance for loan losses was grossly understated by hundreds
11 of millions of dollars.

12 By the end of 1997, Boston Chicken had outstanding loans
13 aggregating nearly one billion dollars to 14 of its FADs. The
14 FADs, however, were experiencing net losses every year and were
15 incapable of repaying their loans to Boston Chicken. A \$128
16 million allowance was established in 1997. However, this amount
17 was far too small in view of the FADs' disastrous financial
18 condition and their inability to repay the loans from Boston
19 Chicken. This resulted in Boston Chicken's major asset being
20 materially overstated by hundreds of millions of dollars.

21 On October 30, 1997, Boston Chicken announced that it was
22 converting its loans to its 14 FADs to a majority ownership
23 interest (The FAD Roll-Up). As a result, Boston Chicken could no
24 longer report revenue generated from franchise royalties,
25 franchise fees and interest as income in its financial
26 statements. Rather it was now required to include in its
27 financial statements the substantial operating losses being
28 suffered by its Area Developers, including the FADs. Indeed,

1 Boston Chicken reported over \$49 million in Area Developer losses
2 in its December 28, 1997 financial statements, an amount in
3 itself materially understated and not previously disclosed in
4 Boston Chicken's income statements.

5 After the decision to Roll-Up the FADs was made, Boston
6 Chicken's business strategy shifted from a franchise-based
7 operation to a company owned store-based operation. The losses
8 being suffered by the Area Developers and the FADs were revealed
9 because once the losses were properly consolidated with and
10 included in Boston Chicken's overall financial results, the
11 Individual Defendants could no longer conceal them.

12 Within months after the Roll-Up of the Area Developers and
13 the FADs, Boston Chicken was forced to file for bankruptcy
14 because it could no longer raise the capital necessary to support
15 the losses sustained by the FADs.

16 Consistent with the above factual background, the Complaint
17 alleges that the Individual Defendants knew, based upon their
18 business sophistication, experience, and knowledge of accounting,
19 that Boston Chicken's financial statements were false and
20 misleading. For example, a loan loss reserve was required, but
21 was not taken against the substantial loans made to the FADs
22 because the loans were impaired; and Boston Chicken's reported
23 revenues, being largely the result of loans made to the FADs and
24 recycled back to Boston Chicken, were fictitious. The Complaint
25 also alleges that the Individual Defendants knew the financial
26 statements audited by Arthur Andersen were false and misleading.
27 Apparently, these false and misleading financial statements

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1 enabled Boston Chicken to raise hundreds of millions of dollars
2 of debt and equity capital from the investing public.

3 The Individual Defendants concealed Boston Chicken's true
4 financial condition and results of operations by failing to
5 disclose the control Boston Chicken had over the FADs; the FADs'
6 inability to report their notes to Boston Chicken; Boston
7 Chicken's inability to generate any real revenue in the absence
8 of recycled revenue flowing back to Boston Chicken from the FADs;
9 and that third-party FAD investors could not and/or would not
10 provide sufficient equity capital to cover the mounting FAD
11 losses. It is for these reasons, that the Complaint alleges that
12 the Individual Defendants further breached their fiduciary duties
13 to Boston Chicken.

14 Merrill Lynch acted as co-lead underwriter for each of
15 Boston Chicken's public offerings and shelf registrations.
16 Throughout Merrill Lynch's involvement as Boston Chicken's lead
17 underwriter the relationship with Boston Chicken was supervised
18 by Charles Lewis, a Managing Director at Merrill Lynch who had a
19 long-standing friendship and business relationship with
20 Individual Defendant Beck. At the time of Boston Chicken's
21 initial public offering, Lewis and his wife were substantial
22 stockholders of Boston Chicken, owning 362,022 shares of Boston
23 Chicken common stock and having an economic interest in an
24 additional 199,507 shares pursuant to the ownership of limited
25 partnership units of BC Midwest LP. After Boston Chicken's
26 initial public offering, Lewis and his wife held as many as
27 961,467 shares of Boston Chicken common stock.

28

1 Alex Brown acted as co-lead underwriter for Boston Chicken's
2 November 8, 1993 initial public offering, the January 25, 1994
3 4-1/2% Convertible Subordinated Debenture Offering, the August 10,
4 1994 Common Stock Offering, the December 5, 1995 Common Stock
5 Offering and the April 22, 1997 7-3/4% Convertible Subordinated
6 Debenture Offering.

7 Morgan Stanley acted as co-lead underwriter for the
8 April 22, 1997 7-3/4% Convertible Subordinated Debenture
9 Offering.

10 Arthur Andersen performed professional accounting services
11 with respect to certain Boston Chicken public offerings. Arthur
12 Andersen consented to act, and in fact did act, as the expert in
13 accounting and auditing for Boston Chicken's November 8, 1993
14 initial public offering; the January 25, 1994 4-1/2% Convertible
15 Subordinated Debenture Offering; the June 13, 1994 Acquisition
16 Shelf Offering; the August 10, 1994 Common Stock Offering; the
17 May 24, 1995 Lyon Offering; the December 5, 1995 Common Stock
18 Offering; the March 5, 1996 Acquisition Shelf Offering; the April
19 22, 1997 7-3/4 Convertible Subordinated Debenture Offering; and
20 the July 23, 1997 Acquisition Shelf/Resale Shelf Offering.

21 In connection with the foregoing offerings, Arthur Andersen
22 consented to the inclusion of its audit opinion in the respective
23 registration statements and to its designation as experts in
24 accounting and auditing. As such, Arthur Andersen was required
25 by generally accepted auditing standards (GAAS) to read the
26 forepart of the registration statements and prospectuses to
27 identify anything contained therein which contradicted the
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1 financial and other information contained in the audited
2 financial statements and accompanying footnotes.

3 Accordingly, the Complaint alleges that beginning at various
4 times, each of the Professional Defendants acted in concert with
5 the Individual Defendants to increase Boston Chicken's insolvency
6 by falsely and unlawfully misrepresenting the true financial
7 condition of Boston Chicken, while at the same time concealing
8 the Individual Defendants' misconduct and breaches of fiduciary
9 duty. In so doing, the Professional Defendants assisted the
10 Individual Defendants in maintaining the facade of growth and
11 solvency while allowing Boston Chicken to become more and more
12 insolvent over time as the Company was increasingly encumbered
13 with obligations, including publically issued notes, that could
14 not be repaid.

15 Among other things, the misstatement and concealment of
16 Boston Chicken's true financial condition, and the Professional
17 Defendants' assistance in obtaining capital from the public
18 securities market, provided the Individual Defendants with the
19 capital necessary to perpetuate their misconduct and drive the
20 company deeper into insolvency. The public offerings further
21 provided the Individual Defendants with capital that the
22 Professional Defendants knew would be "loaned" to the FADs and
23 "recycled" back to Boston Chicken in the form of royalties, fees
24 and interest. Allegedly, the Professional Defendants knew that
25 the recycled funds would then be improperly recognized as
26 revenues by the Individual Defendants.

27 In the case of Boston Chicken's debt offerings, the
28 Professional Defendants affirmatively assisted the Individual

1 Defendants in encumbering Boston Chicken with hundreds of
2 millions of dollars in debt that the Professional Defendants
3 knew, or should have known, could not be repaid.

4 This illusion of growth was further assisted by the
5 Underwriter Defendants insofar as they promoted the illusion of
6 growth and prosperity by preparing analyst reports which
7 repeatedly championed Boston Chicken to the public, usually by
8 relying on financial and business information which the
9 Underwriter Defendants knew, or should have known, was false.

10 On October 22, 1993, the SEC provided Boston Chicken with
11 its comment letter concerning the Registration Statement for
12 Boston Chicken's Initial Public Offering (IPO). Among other
13 things, the SEC specifically requested that Boston Chicken
14 "disclose income or loss from operations for Area Developers."
15 Merrill Lynch, Alex Brown and Arthur Andersen received the SEC's
16 comment letter and directed, reviewed and assisted the Company's
17 response, which was submitted to the SEC by Boston Chicken's
18 general outside counsel, defendant Bell, Boyd & Lloyd.

19 The response to the SEC, dated October 26, 1993, represented
20 to the SEC that Boston Chicken had elected to disclose only
21 "certain selected, aggregate financial information of certain of
22 its area developers [FADs] to assist the reader in evaluating the
23 quality of the Notes Receivable." Even though it was recognized
24 in the foregoing statement that the financial performance of the
25 FADs to Boston Chicken was directly related to the collectability
26 of the Notes Receivable due from the FADs to Boston Chicken, the
27 response letter further stated to the SEC that "the Company
28 believes the requested disclosure of income or loss for area

1 developers' operations does not benefit the reader because the
2 Company does not have any control over the operating activities
3 or results of the area developers, all of which are
4 independently-run businesses."

5 However, the Complaint alleges that the Underwriter
6 Defendants and the Professional Defendants knew or should have
7 known that the FADs were controlled by Boston Chicken and their
8 financial condition was clearly material to Boston Chicken and
9 its future business prospects because virtually all of Boston
10 Chicken's revenue was dependant on payments from the FADs. The
11 only information that Merrill Lynch, Alex Brown and Arthur
12 Andersen chose to disclose in the IPO Prospectus regarding the
13 FADs' financial condition was limited to "selected financial
14 information" that purposely gave the impression that the FADs
15 were growing and profitable enterprises, when in fact, they were
16 not. For example, the section of the Prospectus entitled
17 "Selected Consolidated Financial And Store Data" discloses
18 system-wide store revenues of over \$100 million, but does not
19 references anything regarding the losses by the FADs, the
20 "recycling" of the proceeds of the Boston Chicken loans back to
21 Boston Chicken in the form of fees, interest, and royalty
22 payments, or the inability of Boston Chicken to collect the
23 outstanding Notes Receivable owed by the FADs to Boston Chicken.

24 Apparently, this type of "non-disclosure" continued
25 throughout several other types of offerings. Specifically, the
26 Complaint asserts the "non-disclosure" occurred during the IPO of
27 1993, the 4-1/2% Convertible Debenture Offering, the Common Stock
28 Offering of August 10, 1994, the Liquid Yield Option Notes (LYON)

1 of 1995, the December 5, 1995 Common Stock Offering and, the 1997
2 Debenture Offering. Basically, the role of the FADs and the true
3 financial condition of Boston Chicken was either not provided or,
4 when provided, misrepresented. Typically when such offerings
5 were made, the Professional Defendants would limit the disclosure
6 of financial information to the "selected financial information",
7 discussed above; this gave the improper impression that the FADs
8 were growing and profitable enterprises, when in fact, they were
9 not.

10 Moreover, in various published articles, the Professional
11 Defendants assisted the Individual Defendants in quelling
12 criticisms of Boston Chicken's reported revenue and "aggressive"
13 accounting practices. Specifically, On August 12, 1994, an
14 article was published by *USA Today* that raised questions relating
15 to Boston Chicken's reported revenue, net income and cash flow as
16 well as the lack of reserve for the loans to the FADs.

17 On the same day the *USA Today* article came out, both Merrill
18 Lynch and Alex Brown published reports to discredit the *USA Today*
19 article and dispel concerns relating to issues raised therein.
20 They specifically refuted the contention that Boston Chicken was
21 recycling capital from the FAD's and supported Andersen's failure
22 to establish a loan loss reserve. Similarly, Peter Oakes of
23 Merrill Lynch affirmatively misrepresented the Company's income
24 and recognition reserves for bad debt were "reasonable and in-
25 line with existing industry practice." Further, Merrill Lynch
26 misrepresented that "there has been no need for a reserve" and
27 the Company's prospects do not presently warrant a reserve."

28

1 On November 14, 1995, during the registration for the 1995
2 Stock Offering, Mayer, Brown & Platt, counsel to Merrill Lynch
3 and Alex Brown, received a copy of an anonymous letter addressed
4 to the SEC. Before the public offering of Boston Chicken's
5 common stock could occur, a registration statement had to be
6 reviewed and declared effective by the SEC. The anonymous letter
7 raised questions and presented criticisms about the existence, or
8 extent of, disclosures made, or which should be made, in the
9 registration statement believed to be under review by the SEC.
10 Further, this letter attached financial statements from one of
11 Boston Chicken's Area Developers reflecting losses of over \$2.8
12 million for 1993 and over \$4.9 million for 1994.

13 Despite receipt of this letter, the parties involved
14 continued on with the 1995 Stock Offering without making any
15 additional precautionary disclosures in the Prospectus. Rather,
16 as with the other offerings, Merrill Lynch, Alex Brown and Arthur
17 Andersen agreed not to disclose any unfavorable information
18 regarding the financial condition of the FADs.

19 This anonymous letter prompted the SEC to initiate and
20 conduct an investigation into the financial reporting made by
21 Boston Chicken in its public filings and registration statements.
22 Accordingly, on January 24, 1996, Boston Chicken was informed by
23 the SEC that the SEC was conducting an informal investigation of
24 Boston Chicken, which Boston Chicken referred to as "Project X."

25 On January 25, 1996, Boston Chicken, at the direction and
26 request of the Individual Defendants, retained Arthur Andersen to
27 represent Boston Chicken in the Project X investigation. The
28 scope of Arthur Andersen's representation included advising

1 Boston Chicken about its financial disclosure obligations in its
2 future SEC required filings.

3 The Complaint asserts, that as a result of the relationship
4 between Arthur Andersen and Boston Chicken, Arthur Andersen
5 became a fiduciary and owed Boston Chicken fiduciary duties. The
6 Complaint alleges that in conjunction with the fiduciary
7 relationship, Arthur Andersen committed primary violations of
8 these fiduciary duties and/or secondary violations thereof as an
9 aider and abettor in representing Boston Chicken in the Project X
10 investigation.²

11 On February 8, 1996, the SEC met with Arthur Andersen and
12 officers of Boston Chicken. The Complaint alleges that Arthur
13 Andersen knew that Boston Chicken's financial accounting
14 practices did not comply with generally accepted accounting
15 principles, but they represented otherwise to the SEC. This
16 resulted in the non-disclosure of information that would have
17 revealed that the FADs were experiencing "unfavorable operating
18 losses." Furthermore, the Individual Defendants knew, but
19 concealed from the SEC the financial recycling relationship
20 between the FADs and Boston Chicken.

21 On March 28, 1996, another SEC meeting was held. Arthur
22 Andersen submitted Boston Chicken's newly amended revenue
23 recognition policy to the SEC. In doing so, it is alleged that

24
25 ² The Complaint notes that Arthur Andersen was Boston Chicken's accountant
26 and each of the FADs accountants since mid-1992, thus alleging that Andersen was
27 fully knowledgeable about the business, financial and accounting affairs of
28 Boston Chicken and each of the FADs, as well as the interrelationship between
Boston Chicken and the FADs. The Complaint alleges that Arthur Andersen utilized
such knowledge in preparing the response to the Project X investigation, for
example, Arthur Andersen was allegedly aware that Boston Chicken had loaned the
FADs a total of \$411,410,000.00 dollars as of December 31, 1995.

1 Arthur Andersen intended to perpetuate the false impression with
2 the SEC that Boston Chicken was not recycling revenue from the
3 FADs.

4 On April 11, 1996, the SEC requested further specific
5 accounting information from Boston Chicken. On May 3, 1996, a
6 response was prepared by the Individual Defendants and reviewed
7 by Arthur Andersen. In general, the response addressed the
8 issues of "recycled revenue" and the FAD loan impairment.
9 Allegedly, the "recycled revenue" section was intended to show
10 that the FAD loans were not being utilized to pay Boston Chicken
11 franchise and software fees. The FAD loan impairment section
12 claimed that the FAD loans were not impaired because the
13 collateral value of the FADs exceeded their outstanding loans to
14 Boston Chicken. Throughout the Project X investigation, the
15 Individual Defendants and Arthur Andersen resisted the SEC's
16 efforts to provide quarterly financial information concerning the
17 FADs. They argued that providing quarterly financial information
18 about the FADs would be unduly confusing to the public, and that
19 only aggregate FAD losses and other limited information should be
20 publically disclosed.

21 Based on the faulty representations made by the Professional
22 Defendants to the SEC, the SEC declared the registration
23 statement for the 1997 Debenture Offering effective, resulting in
24 Boston Chicken being encumbered with an additional \$287 million
25 in debt. The registration statement for the 1997 Debenture
26 Offering misrepresented and/or omitted several material facts
27 which, if disclosed, could have prevented Boston Chicken from
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1 incurring \$287 million in debt that could not be repaid and the
2 consequent deepening of Boston Chicken's insolvency.

3 Overall, Boston Chicken's allowance for loan losses on Notes
4 Receivable from the Area Developers was zero from 1992 through
5 1996. By the end of 1997, Boston Chicken had outstanding loans
6 aggregating nearly one billion dollars to 14 of its Area
7 Developers. By December 28, 1997, the 1997 fiscal year end, the
8 company determined that all the Area Developer loans might be
9 impaired and therefore established a newly created allowance for
10 loan losses in the amount of \$128 million. Despite this
11 knowledge, Arthur Andersen signed unqualified audit
12 certifications for Boston Chicken's financial statements, even
13 when they showed absolutely no allowance for loan losses from the
14 period 1992 through and including 1996.

15 Additionally, on January 30, 1997, at a Special Meeting of
16 the Board of Directors for Boston Chicken, the Board approved the
17 formation of Progressive Food Concepts, Inc. (PFCI). Individual
18 Defendants Nadhir and Beck became substantial stockholders in
19 PFCI on the day it was formed and funded with a loan from Boston
20 Chicken. The articulated purpose for Boston Chicken's investment
21 in PFCI was to break in to the "ready to eat" and "heat and eat"
22 market.

23 When PFCI failed to turn a profit, the Board of Directors
24 for Boston Chicken approved the acquisition of 83% of both Nadhir
25 and Beck's stock (4,000 shares each) at a price of \$4,180,480.00
26 apiece. The purchase price consisted of \$1,000,000.00 apiece in
27 cash and a promissory notes to each of them in the amount of
28 \$3,181,480.00 (the PFCI Notes). Subsequently, Boston Chicken

1 received an option to acquire each of Nadhir and Beck's remaining
2 333.335 shares. On November 7, 1997, Boston Chicken exercised
3 its option to acquire Nadhir and Beck's remaining shares by
4 paying (1) \$345,147.17 apiece (\$1,000 per share plus 8% interest
5 from January 31, 1997) and (2) a 50% prepayment of each of the
6 PFCI Notes, i.e. \$1,590,740 apiece. All told, including the
7 funds paid to Nadhir and Beck, Boston Chicken lost or paid out
8 well over \$10,000,000.00 with no assets returned on which any
9 creditors could realize in relation to the PFCI formation.

10 In 1998, Nadhir resigned as the Chief Executive Officer and
11 Co-Chairman of the Board of Directors of Boston Chicken. In
12 accordance with his resignation, Nadhir entered into a consulting
13 agreement on May 1, 1998. Pursuant to this agreement, Nadhir was
14 to be paid consulting fees equal to \$400,000.00 per year, payable
15 in equal biweekly installments throughout the term. The
16 Complaint alleges that Nadhir received six such payments under
17 the Consulting Agreement, totaling \$100,000.00

18 Subsequent to filing the bankruptcy petition, but before the
19 Complaint in this action was filed, Alex Brown also received
20 substantial sums in monetary payments. Three of the payments
21 were purportedly made pursuant to a fee agreement dated July 15,
22 1998. On October 2, 1998 a payment of \$550,000.00 was made by
23 wire transfer, purportedly made pursuant to a letter agreement
24 dated September 28, 1998. This payment was an alleged initial
25 payment towards a "restructuring fee" of \$5,355,000.00. However,
26 the Complaint asserts that the alleged restructuring referred to
27 in the September 28, 1998 letter was never consummated.

28

1 **DISCUSSION**

2 In analyzing a motion to dismiss for failure to state a
3 claim upon which relief may be granted, all allegations of
4 material fact in the plaintiff's complaint are taken as true and
5 construed in the light most favorable to the nonmoving party.
6 See *National Wildlife Federation v. Epsy*, 45 F.3d 1337, 1340 (9th
7 Cir. 1995); see also *Levine v. Diamanthuset, Inc.* 950 F.2d 1478,
8 1482 (9th Cir. 1991), *rev'd on other grounds*, 950 F.2d 1478.

9 Dismissal of an action pursuant to Rule 12(b)(6) of the
10 Federal Rules of Civil Procedure is "proper only where it appears
11 beyond doubt that plaintiff can prove no set of facts in support
12 of his claim which would entitle him to relief." *Conley v.*
13 *Gibson*, 355 U.S. 41 (1957).

14 **A. Motion to Dismiss, by All Defendants of Counts I, II,**
15 **III, IV, VIII, IX, X, XI, XIV, XV, XVI and XVII of the**
16 **Complaint in their entirety based on statute of**
 limitations grounds

17 As indicated above, there are numerous pending Motions to
18 Dismiss the various Counts on several grounds. However, as a
19 threshold matter, this Court must first address the "Motion of
20 All Defendants" to dismiss the aforementioned Counts based on
21 statute of limitations.

22 Defendants move to dismiss the aiding and abetting, breach
23 of fiduciary duty, acting in concert, negligent representation
24 and other negligence counts (collectively the "Tort Counts") on
25 the grounds that all are barred in their entirety by the two-year
26 statute of limitations in *Ariz.Rev.Stat. § 12-542*.

27 Defendants claim that debtor Boston Chicken possessed
28 knowledge sufficient to trigger the statute of limitations on the

1 Tort Counts no later than March of 1996. Thus, they claim, that
2 the limitations period for the Torts Counts expired in March of
3 1998, over six months before Boston Chicken filed for bankruptcy.
4 The Defendants further argue that the Tort Counts expired before
5 the bankruptcy petition was filed and thus, they are not entitled
6 to the two-year extension of limitations period covered by 11
7 U.S.C. § 108(a).³

8 Should this court determine that certain limitations periods
9 for the Tort Claims extended past Boston Chicken's bankruptcy
10 filing of October 5, 1998, defendants argue that Plan Trustee may
11 not claim the benefit of § 108(a) since he only achieved his
12 representative capacity upon confirmation for the Third Amended
13 Plan of Reorganization.

14 1. Choice of law

15 Trustee argues that Colorado law should govern. Using
16 Colorado law would require this Court to apply a three year
17 statute of limitations to the breach of fiduciary duty and aiding
18 and abetting breach of fiduciary duty claims. Col.Rev.Stat. §
19 13-80-101(1)(f); see also *Polk v. Hergert Land & Cattle*, 5 P.3d
20 402, 405 (Colo. App. 2000). On the other hand, under Arizona
21 law, those claims are subject to a two-year statute of
22 limitations. See *CDT, Inc. v. Addison, Roberts & Ludwig*, 198
23 *Ariz.* 173, 7 P.3d 979, 981 (Ariz. App. 2000). Both Arizona and

25 ³ 11 U.S.C. § 108(a) provides, "[i]f applicable nonbankruptcy law, an
26 order entered in a non-bankruptcy proceeding, or an agreement fixes a period
27 within which the debtor may commence an action, and such period has not expired
28 before the date of the filing of the petition, the trustee may commence such
action only before the later of - (1) the end of such period, including any
suspension of such period occurring on or after the commencement of the case; or
(2) two years after the order for relief.

1 Colorado law establish a two-year limitations period for the
2 remainder of the Tort Counts asserted in this action.
3 Ariz.Rev.Stat. § 12-542; Colo.Rev.Stat. § 13-80-102.

4 The application of either Arizona or Colorado law turns on
5 this Court's interpretation of Restatement (Second) of Conflict
6 of Laws § 142 (revised 1988):

7 Whether a claim will be maintained
8 against the defense of the statute of
9 limitations is determined under the
10 principles stated in § 6. In general,
11 unless the exceptional circumstances of
12 the case make such a result
13 unreasonable:

- 14 (1) The forum will apply its own
15 statute of limitations barring
16 the claim.
- 17 (2) The forum will apply its own
18 statute of limitations
19 permitting the claim unless:
 - 20 (a) maintenance of the claim
21 would serve no
22 substantial interest of
23 the forum; and
 - 24 (b) limitations of a state
25 having a more significant
26 relationship to the
27 parties and the
28 occurrence.

18 The general rule stated by § 142 is very clear: as a
19 starting point, the forum's statute of limitations applies. See
20 *DeLoach v. Alfred*, 192 Ariz. 28, 30 (1998). If there exists
21 exceptional circumstances, or if the two factors mentioned in
22 § 142(2) are present, it would require the application of
23 Colorado's longer statute.

24 Trustee makes no argument that exceptional circumstances
25 would apply. Instead, Trustee relies on the significant
26 relationship factor set forth in § 142(2); reasoning that Boston
27 Chicken had its headquarters in Colorado and most, if not all, of
28

1 the transactions complained of stem from conduct more
2 significantly related to Colorado than Arizona.

3 This Court is persuaded that the connection to Colorado is
4 more significant than Arizona. While the matter was filed in
5 Arizona, the majority of the conduct occurred in, or is related
6 to Colorado. Restatement (Second) Conflict of Law § 6 cmt. e.
7 (Where the state of the forum has no interest in the case apart
8 from the fact that it is the place of the trial. Here only
9 relevant policies of the state of the forum will be embodied in
10 its rule relating to trial administration).

11 Accordingly, for the purposes of determining dismissal based
12 on statute of limitations, this Court will apply Colorado law.

13 2. *Accrual of the statute of limitations*

14 Because the filing of a bankruptcy case often brings a new
15 party, the trustee, into the affairs of the debtor, the
16 Bankruptcy Code provides special time limitations for the trustee
17 to take action that the debtor could have taken under
18 nonbankruptcy law. 11 U.S.C. § 108; *see also Collier on*
19 *Bankruptcy* § 108.01 (15th ed. 1996). Generally, § 108(a) gives
20 the trustee at least two years from the date of the order for
21 relief to commence an action the debtor could have brought on the
22 petition date.

23 Specifically, § 108(a) provides:

24 If applicable nonbankruptcy law, an
25 order entered in an nonbankruptcy
26 proceeding, or an agreement fixes a
27 period within which the debtor may
28 commence an action, and such period has
not expired before the date of the
filing of the petition, the trustee may
commence such action only before the
later of -

- 1 (1) the end of such period,
2 including any suspension of
3 such period occurring on or
4 after the commencement of the
5 case; or
- 6 (2) two years after the order for
7 relief.

8 In the instant action, the "order for relief", voluntary
9 bankruptcy petition, was entered on October 5, 1998. Thus,
10 Trustee argues that § 108(a)(2) permits the assertion of the
11 Torts Counts for two years from the filing of the bankruptcy
12 petition, October 5, 2000. This Court notes, that the Complaint
13 was filed in this action on February 5, 2001 but the Complaint
14 indicates that the parties had a separate tolling agreement which
15 further extended the filing date to February 5, 2001.

16 Typically, in Colorado, a cause of action for negligence
17 must be filed within two years after the cause of action accrues
18 or in the case of breach of fiduciary duty and aiding and
19 abetting breach of fiduciary duty, a three year limitation is
20 permitted. Colo.Rev.Stat. § 13-80-101(1)(f). However, Colorado
21 subscribes to the general discovery rule, which renders the
22 statute of limitations somewhat flexible.

23 Under the discovery rule, a cause of action shall be
24 considered to accrue on the date both injury and its causes are
25 known or should have been known by the exercise of reasonable
26 diligence. Colo.Rev.Stat. § 13-80-108(1). In other words, the
27 limitations period does not commence until a party is put "on
28 notice of the nature, extent and cause of injury." *Salazar v.*
29 *American Sterilizer*, 5 P.3d 357, 363 (Colo. 2000) (a claim for
30 relief does not accrue until the plaintiff knows, or should know,

1 in the exercise of reasonable diligence, all material facts
2 essential to show the elements of that cause of action).

3 Trustee persuasively argues that a cause of action is tolled
4 if the defendant affirmatively misleads or conceals the cause of
5 action from the plaintiff. *Piper Aircraft*, 744 P.2d at 1200.
6 This Court's review of the Complaint reveals that it pleads with
7 sufficient particularity the fraudulent concealment of the
8 Trustee's claims until well beyond October 5, 1996.

9 Specifically, the Complaint points to Arthur Andersen's
10 assurances to the Outside Directors and Audit Committee that
11 Boston Chicken was stable financially. There were several
12 blatant attempts at concealing the financial condition of Boston
13 Chicken to the SEC during the course of its investigation and the
14 general public by the dissemination of various business articles.

15 The Complaint makes a *prima facie* showing that the outside
16 Directors and Audit Committee were unaware of the "nature, extent
17 and cause" of Boston Chicken's true financial condition until
18 bankruptcy proceedings were initiated.

19 On the other hand, defendants argue that there were
20 substantial "red-flags" to put the relevant parties on notice.
21 The most compelling of which is the SEC investigation. Clearly,
22 continued SEC investigations, the anonymous letter to the SEC,
23 news reports and analyst reports may have triggered the knowledge
24 requirement.

25 However, who knew what, when it became known, and what
26 triggered such knowledge, is a question of fact under these
27 circumstances. In this case, the Trustee claims fraudulent
28 concealment; the defendants claim knowledge. Accordingly,

1 because this Court is obligated to review the matter in the light
2 most favorable to the nonmoving party and because rendering a
3 decision as to the accrual date of the statute of limitations
4 would require a factual determination by this Court, the Motion
5 by all defendants to dismiss this matter on statute of
6 limitations grounds is denied.

7 **B. Arthur Andersen's Motion to Dismiss Counts VIII, IX, X,
8 XI and XII**

9 As a threshold matter, the parties agree that Colorado
10 substantive law should apply to Counts VIII, IX, X, XI, XII.

11 1. *Dismissal for lack of subject matter jurisdiction-*
12 *Fed.R.Civ.P. 12(b)(6).*

13 Arthur Andersen argues that Counts VIII, IX, X, XI, XII
14 should be dismissed for lack of subject matter jurisdiction
15 because the Trustee lacks standing to bring this action under the
16 doctrine of *in pari delicto*.

17 The doctrine of *in pari delicto* dictates that when a
18 participant in illegal, fraudulent, or inequitable conduct seeks
19 to recover from another participant in that conduct, the parties
20 are deemed *in pari delicto*, and the law will aid neither, but
21 rather, will leave them where it finds them. *See Bushner v.*
22 *Bushner*, 134 Colo. 509, 307 P.2d 204 (1957); *see also Abernethy*
23 *v. Wright*, 27 Colo.App. 239, 148 P. 277 (1915); Black's Law
24 Dictionary 711 (rev. 5th ed. 1979) (*in pari delicto* defined as
25 "in equal fault" or "equally culpable or criminal"); *Apostolou v.*
26 *Fisher*, 188 B.R. 958 (N.D.Ill.1995) (since debtor corporation did
27 not sustain injury as victim of fraud but was injured only
28 because it participated in *in pari delicto* in fraudulent scheme,

1 corporation's trustee could not recover against third party for
2 damage to creditors).

3 The doctrine of *in pari delicto* contains one significant
4 exception.

5 Although a corporation is generally not
6 chargeable with the knowledge of its
7 officer or director concerning a
8 transaction in which the officer or
9 director is acting in his own behalf the
10 corporation will be charged with the
11 agent's knowledge where any action taken
12 by the agent would benefit both the
13 agent and the corporation, the interests
14 of the individual officer or director
15 being clearly aligned with those of the
16 corporation. Moreover, the exception to
17 the general rule of imputed notice to a
18 corporation that arises where an
19 officer, director, agent or employee is
20 acting fraudulently or adversely to the
21 corporation is not triggered where the
22 individual is also acting for the
23 principal's benefit even though the
24 agent's primary interest is inimical to
25 that of the principal. [K]nowledge will
26 not be imputed to the corporation on the
27 basis of an assertion that its agents,
28 though motivated by personal interests
did benefit the corporation, where,
under the facts, there is no actual
benefit to the corporation.

18B Am.Jur.2d Corporations § 1681 (1995) (emphasis added).

20 Arthur Andersen also relies on the "Wagoner" Rule, which
21 holds that a bankrupt corporation's trustee lacks standing to
22 bring a claim against a third party for defrauding or misleading
23 the corporation with the cooperation of the corporation's
24 management. See *Shearson Leahman Hutton v. Wagoner*, 944 F.2d
25 114, 120 (2nd Cir. 1991). Trustee argues that the Wagoner Rule
26 only applies to sole shareholder situations.

27 Although, Wagoner involved a sole shareholder who
28 orchestrated the fraud, and whose conduct was thus clearly

1 attributable to the corporation, under the "sole actor" exception
2 to the "adverse interest doctrine" of agency law subsequent cases
3 have recognized that the *Wagoner* rule is also applicable outside
4 the sole actor context if "all relevant shareholders and/or
5 decisionmakers" were involved in the wrongful conduct, or if
6 there is otherwise sufficient "unity" between the corporation and
7 defendant to implicate the corporation itself, rather than just
8 its agents. See *Mediators v. Manney*, 105 F.3d 822, 827 (2nd Cir.
9 1997); see *Lippe v. Bairnaco Corp.*, 218 B.R. 294, 302 (S.D.N.Y.
10 1998); *Securities Investor Protection Corp. v. BDO Seidman, LLP.*,
11 49 F.Supp.2d 644, 651 (S.D.N.Y.).

12 In this case, the *Wagoner* rule and *in pari delicto* doctrine
13 do not apply. As set forth in *Weshcler*, cases involving more
14 than one corporate actor, the plaintiff may avoid dismissal for
15 lack of standing by alleging the existence of "an innocent
16 member...of management who would have been able to prevent the
17 fraud had he known about it." *Weschler v. Squadron, Ellenoff,*
18 *Pleasant & Sheinfeld*, 212 B.R. 34, 44-45 (S.D.N.Y. 1997).

19 The central issue for this Court to determine is whether the
20 defendants were acting for themselves or for the corporation of
21 Boston Chicken. See *Sender*, 952 P.2d at 782 (Court imputed
22 illegal act to corporation because the corporation benefitted
23 from the illegal acts); see also *Stat-Tech*, 905 F.Supp. at 1422
24 (no imputation because the wrongdoers acted adversely to the
25 corporation).

26 Arthur Andersen suggests the Individual Defendants were
27 acting in pursuit of the company's business plan, and does not
28 allege the wrongdoing was exclusively in pursuit of their own

1 financial gain. Thus, because the individuals' wrongful conduct
2 was in pursuit of a business plan the alleged wrongdoing has to
3 be imputed to the debtor, in whose shoes the Trustee now stands.

4 Trustee alleges that the conduct was adverse to Boston
5 Chicken, "such conduct benefitted the individual defendant's in
6 their individual capacities, but was *completely and directly*
7 *adverse to the interests of BCI.*" (Emphasis added). Where, as
8 is alleged here, the Complaint alleges a far-reaching scheme to
9 continue a company in business past its point of insolvency and
10 systematically looting it, it cannot be said that such conduct
11 benefitted the corporation. See *Stat-Tech*, 905 F.Supp. at 1422.

12 I [Colorado District Court] agree with
13 the Seventh Circuit's conclusion in
14 *Schacht* that to accept a rule that
15 precludes a corporation from recovering
16 damages resulting from the hiding or
17 creation of misinformation concerning
18 its insolvency would be to create
19 'perverse incentives for wrong-doing
20 officers and directors to conceal the
21 true financial condition of the
22 corporation from the corporate body as
23 long as possible.'

24 *id.* at 1423.

25 Moreover, whether or not the intent of the Individual
26 Defendants was to exclusively benefit themselves personally or if
27 their aim was fulfillment of a business plan, is not for this
28 Court to decide; that is a factual issue. All this Court need be
concerned with at this time is whether the Trustee made a
sufficient showing that the conduct of the defendants adversely
affected Boston Chicken.

Moreover, to avoid dismissal pursuant to *Wagoner*, Trustee
has adequately alleged that there were innocent members on Boston

1 Chicken's Board and Audit Committee who were unaware of the
2 wrongdoing. *Weschler*, 212 B.R. 34, 44-45. While discovery may
3 reveal that the alleged "innocent members" had some limited
4 knowledge of the wrongdoing, the Trustee's allegations are
5 sufficient to survive this Motion to Dismiss based on lack of
6 standing. At this time, for this Court to determine which
7 members possessed sufficient knowledge, when it was obtained, and
8 what they did with such knowledge would require this Court to
9 make improper factual determinations.

10 2. *Failure to state claim*

11 Additionally, Arthur Andersen claims that Counts VIII
12 through XI should be dismissed under Rule 12(b)(6) for failure to
13 allege causation.

14 Causation is an essential element of the tort claims
15 asserted against Arthur Andersen. See *Holmes v. Young*, 885 P.2d
16 305, 308 (Colo.App. 1994) (aiding and abetting breach of fiduciary
17 duty); *Jet Courier Service, Inc. v. Mulei*, 771 P.2d 496, 502
18 (Colo. 1989) (conspiracy); *Casebolt v. Cowan*, 829 P.2d 352, 356
19 (Colo. 1992) (negligence); *Mehaffy, Rider, Windholz & Wilson v.*
20 *Central Bank of Denver*, 892 P.2d 230, 238 (Colo. 1995) (negligent
21 misrepresentation).

22 Arthur Andersen contends that the Trustee's Complaint merely
23 alleges what steps the Audit Committee and/or Boston Chicken's
24 creditors could have done, when the law requires allegations of
25 what would have been done to stop the misconduct. To support
26 this argument, Arthur Andersen relies on *Color Tile v.*
27 *Investocorp*. 80 F.Supp.2d 129 (S.D.N.Y. 1999).

28

1 In *Color Tile*, the Unsecured Creditors Committee sued an
2 accounting firm for breach of fiduciary duty, aiding and abetting
3 breach of fiduciary duty, and breach of contract in connection
4 with performing annual audits of debtor's financial statements.
5 See *Color Tile*, 80 F.Supp.2d at 131. The Court held that "the
6 only allegation that Coopers' [defendants'] negligence
7 proximately caused injury to *Color Tile* is that *Color Tile* "could
8 have taken steps that would have preserved whatever value of the
9 company was salvageable." See *id.* at 139. The Court
10 unequivocally stated, "[s]uch an allegation is plainly
11 insufficient" to show entitlement to relief. *Id.* The Court
12 further held that in order to prove proximate cause, *Color Tile*
13 must show not only that they "could have taken steps to salvage
14 itself, but that they would have done so." *Id.* (emphasis in
15 original).

16 In any event, the Complaint clearly states, "[h]ad the
17 Individual Defendants and Professional defendants properly
18 discharged their duties...the Board of Directors, the Audit
19 Committee and/or Boston Chicken's creditors could have taken
20 steps to prevent [Boston Chicken] from suffering additional
21 harm." (emphasis added).

22 *Color Tile*, is distinguishable from this case in that the
23 "innocent directors" of *Color Tile* voted in favor of a highly
24 speculative acquisition "partly out of their own self interest in
25 keeping there jobs with the company, even though they knew that
26 the transaction was adverse to *Color Tiles* interest." *Color*
27 *Tile*, 80 F.Supp.2d at 137. In *Color Tile*, all directors knew
28 that the purchase price was grossly excessive, the projections

1 supporting the transaction were unrealistic and exaggerated, and
2 the transaction would impose an imprudent an unmanageable debt
3 structure on Color Tile. Id. at 137.

4 Unlike Color Tile, the Trustee in these proceedings alleged
5 that there were innocent members on the Boston Chicken's Board
6 and Audit Committee who were unaware of the misconduct and could
7 have taken action against Arthur Andersen and others. To
8 determine whether or they actually would have taken action and
9 what type of action was necessary, is a question that can only be
10 answered after some discovery has taken place, but not at this
11 preliminary stage.

12 **C. Alex Brown/Deutsche Banc, Motion to Dismiss Counts XVIII**
13 **and XIX**

14 **1. Count XVIII - fraudulent transfer**

15 Deutsche Banc/ Alex Brown (hereinafter Alex Brown) move to
16 dismiss Count XVIII, fraudulent transfer and fraudulent
17 concealment, for failure to plead fraud with the specificity
18 required by Fed.R.Civ.P. 9(b).

19 "In all averments of fraud or mistake, the circumstances
20 constituting fraud or mistake shall be stated with particularity.
21 Malice, intent, knowledge, and other condition of mind of a
22 person may be averred generally." Fed.R.Civ.P. 9(b). While the
23 purpose of Rule 9(b) is to provide detailed notice of the
24 circumstances constituting fraud, each and every alleged
25 misrepresentation need not appear in the pleadings. 2 Moore's
26 Federal Practice § 9.03[1][a]. A claimant is only required to
27 set forth the major misrepresentations or omissions upon which
28 the fraud claims are based. A claimant is not required to

1 explain the legal theory of the fraud claim. See *Midwest*
2 *Commerce Banking Co. v. Elkhart City Centre*, 4 F.3d 521, 523 (7th
3 Cir. 1993).

4 The requirements of particularity under Rule 9(b) vary with
5 each case. See *Sushany v. Allwaste*, 992 F.2d 517, 521 (5th Cir.
6 1993). A more liberal standard for pleading fraud with
7 particularity is applied in bankruptcy cases. See *O.P.M. Leasing*
8 *Services v. Weissman*, 35 B.R. 854, 862 (S.D.N.Y. 1983), rev'd in
9 part on other grounds, *O.P.M. v. Weissman*, 48 B.R. 824, (S.D.N.Y.
10 1985). This less stringent standard is predicated upon the fact
11 that it is often the trustee, a third party, who is pleading
12 fraud based on second-hand information. See *id.*; see also
13 *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 379 (2nd Cir.
14 1974); *In re Germain*, 144 F.Supp. 678, 683 (S.D.Cal. 1956).

15 Moreover, less particularity is required where plaintiff is
16 not asserting that the fraud was against himself personally, but
17 rather it was committed against a third party. See *O.P.M.*, 35
18 B.R. at 862; see also *Allegart v. Perot*, 78 F.R.D. 427, 430
19 (S.D.N.Y. 1978).

20 Given the normal 9(b) requirements and applying the more
21 liberal standard permitted in bankruptcy matters, it is
22 apparent that the Trustee's Complaint satisfies Rule 9(b).

23 In the 130 page Complaint, Trustee has (1) identified
24 the transfers at issue; (2) identified the relevant parties;
25 (3) alleged Boston Chicken received less than the reasonably
26 equivalent value in exchange for the transfers; and (4)
27 alleged that Boston Chicken was insolvent on the date the
28 transfers were made. See *General Electric Capital Corp. v.*

1 *Lease Resolution Corporation*, 128 F.3d 1074. 1080 (7th Cir.
2 1997) (Rule 9(b) satisfied when plaintiff alleged a transfer
3 of assets, without receipt of reasonably equivalent value,
4 which rendered the transferee insolvent); see also *In re*
5 *O.P.M. Leasing*, 35 B.R. at 862 (Rule 9(b) satisfied when the
6 trustee alleges fraudulent conveyances between certain years
7 for a total sum certain and that these transactions occurred
8 without the provision of fair consideration).

9 2. *Count XIX - preferential transfer*

10 Alex Brown seeks to dismiss the preferential transfer
11 Count, arguing that the payments at issue do not relate to an
12 antecedent debt as required by law.

13 A debtor may ordinarily prefer one or more of its
14 creditors, so long as the transfer or payment is to pay or
15 secure a legitimate debt and does not violate a statute. See
16 *Kenan v. Forth Worth Pipe Co.*, 792 F.2d 125, 127 (10th Cir.
17 1986). However 11 U.S.C. § 547(b) of the bankruptcy code,
18 permits a trustee to avoid certain prebankruptcy transfers as
19 "preferences." 5 *Collier on Bankruptcy* § 547.01.

20 Section 547(b) sets forth the elements of an avoidable
21 preference:

- 22 (1) any transfer of an interest of the debtor in
23 property;
- 24 (2) to or for the benefit of a creditor;
- 25 (3) for or on account of an antecedent debt owed by the
26 debtor
- 27 (4) made while the debtor was insolvent;
- 28 (5) made (A)...within 90 days before bankruptcy; or (B)
 between 90 days and one year before bankruptcy, if

1 the transferee was an insider at the time of the
2 transfer; and

3 (6) that enables the creditor to receive more than it
4 would receive if (A) the case were a case under
5 Chapter 7 of the Code, (B) the transfer had not
6 been made, and (C) the creditor received payment of
7 its debt to the extent provided by the Code.

8 11 U.S.C. § 547. (emphasis added). An antecedent debt is
9 defined as a debt which is incurred prior to the relevant
10 transfer. See *In re Intercontinental Publications*, 131 B.R.
11 544, 549 (Bankr.D.Conn. 1991); see also *Martha Management,*
12 *Inc.*, 174 B.R. 671, 677 (Bankr.D.S.D.N.Y. 1994).

13 Alex Brown acted as co-lead underwriter with Merrill
14 Lynch in all but one of Boston Chicken's public offerings,
15 and also acted as Boston Chicken's financial advisor in
16 connection with each of these offerings. In mid-1998, Boston
17 Chicken's new management hired Alex Brown specifically to
18 provide financial services in connection with renegotiating
19 Boston Chicken's current debt. Shortly thereafter, Alex
20 Brown allegedly reported to the Board that it had made no
21 progress in the attempted refinancing of Boston Chicken's
22 massive debt. The Complaint alleges that Alex Brown received
23 four substantial payments within 90 days of Boston Chicken's
24 bankruptcy filing as payment for the failed refinancing
25 (October 5, 1998, \$150,000.00; September 11, 1998,
26 \$164,00.86; September 28, 1998, \$165,080.36; and October 2,
27 1998, \$550,000). These payments were an "initial payment"
28 towards a fee of \$5,355,000.00, for "restructuring" that, the
Complaint alleges, was never consummated.

1 Alex Brown disputes that the transfer was made "for or
2 on account of an antecedent debt." He argues that the first
3 three transfers were payments related to services rendered
4 contemporaneously with the payments. As such, the payments
5 were made on accounts of current, not antecedent, debts and
6 are not subject to avoidance as preferences. With respect to
7 the last payment, the restructuring fee, Alex Brown argues
8 that it was a payment for future services which were never
9 performed. Thus, it should be considered a payment on
10 account of a future, not antecedent, debt.

11 This Court's review of the Complaint establishes that
12 the Trustee has made the requisite *prima facie* showing that
13 the payments made to Alex Brown were antecedent.

14 **D. Individual Defendants Motion to Dismiss Counts I-**
15 **VII**

16 The Individual Defendants move to dismiss Counts I-IV
17 arguing that these Counts are barred by the statute of
18 limitations, the Trustee lacks standing, and the Trustee does
19 not allege facts sufficient to overcome the protection for
20 business judgement. Additionally, the Individual Defendants
21 argue dismissal of Counts V-VII for failure to plead fraud
22 with particularity and because the preferential transfers
23 were not for antecedent debts.

24 **1. Statute of limitations**

25 In order to prevent duplication, the parties are
26 referred to the section A(2) of this Order for a thorough
27 discussion on this issue.

28

1 2. *Standing*

2 The Individual Defendants argue that the Trustee lacks
3 standing to sue because a bankruptcy trustee does not have
4 standing to pursue claims on behalf of the debtor when the
5 creditors are the real party in interest.

6 In support of their argument they rely primarily on
7 *Williams v. California 1st Bank*, 859 F.2d 664 (9th Cir. 1988).
8 In *Williams*, the Trustee received authority to solicit and
9 accept from investors assignments of their claims. See *id.*
10 at 664. The Trustee then filed suit on behalf of the estate
11 and the investors. See *id.* at 665. A Motion to Dismiss was
12 filed arguing that the Trustee had no standing to bring the
13 claim of the investors. See *id.* The district court denied
14 the motion, concluding that a Trustee may bring claims of
15 third party creditors where there was an actual assignment
16 approved by the bankruptcy court. See *id.*

17 Subsequently, the Ninth Circuit, relying on *Caplin v.*
18 *Marine Midland Grace Trust Co.*, held that the Trustee in
19 *Williams* lacked authority to bring the claims despite
20 assignment. See *Williams*, 859 F.2d at 667. The Appellate
21 Court reasoned that there was nothing in the statutory
22 framework of the bankruptcy code that permitted a Trustee to
23 "collect money not owed to the estate." *Id.*

24 The holdings in *Williams* and *Caplin* do not, however,
25 apply to the facts and law governing this matter. In this
26 case, the Trustee is attempting to recover funds owed to the
27 estate, not money owed to a creditor. Further there are no
28 allegations, either in the Complaint or the moving papers,

1 that any creditors or investors assigned any rights to the
2 Trustee.

3 Contrary to what the Individual Defendants seem to imply
4 through their selective representation of case law, the
5 Trustee is charged with administering the estate of Boston
6 Chicken. Recovering monies wrongfully disbursed, pursuing
7 professional negligence and breach of contract claims is most
8 certainly the obligation of, and the purpose of, the
9 appointment of a Trustee. 11 U.S.C. § 323. Thus, it is
10 abundantly clear to this Court, that the Trustee has standing
11 to bring these allegations against the Individual Defendants.

12 3. *Business judgment*⁴

13 The business judgment rule acts to protect from
14 liability directors of a corporation acting in good faith.
15 See *Polk v. Hergert Land & Cattle Co*, 5 P.3d 402, 405 (Colo.
16 2000); see also *Wolf v. Rose Hill Cemetery Ass'n*, 914 P.2d
17 468 (Colo.App.1995); *Amoco Oil Co. v. Ervin*, 908 P.2d 493
18 (Colo. 1995); see also *Unocal Corp. v. Mesa Petroleum Corp.*,
19 493 A.2d 946, 954 (Del. 1985). Obviously, to be protected
20 under the business judgment doctrine it must be determined
21 that the parties acted in good faith. See *Amoco Oil Co.*, 908
22 P.2d 493.

23 The determination of good faith is a question of fact
24 that is to be decided on a case-by-case basis. See *Polk*, 5

25
26 ⁴ The Court notes the Trustee and Individual Defendants dispute which law
27 should be applied; Colorado or Delaware. Trustee persuasively argues that the
28 Colorado Supreme Court, in interpreting the Restatement (Second) Conflict of Law
§ 309 (1971), has determined that where the corporation's primary base of
operation is Colorado, the laws of the state of incorporation do not apply.

1 P.3d at 405; see also *Amoco Oil Co.*, 908 P.2d at 493;
2 *Resolution Trust Corp v. Heiserman*, 839 F.Supp. 1457, 1463
3 (D.Colo. 1993) (a ruling on the applicability of the business
4 judgment rule is peculiarly a question of fact, wholly
5 inappropriate for consideration on a motion to dismiss);
6 *Weibolt Stores, Inc. v. Schottenstein*, 111 B.R. 162, 174
7 (N.D.Ill. 1990) (dismissal especially inappropriate here,
8 where the propriety of the Board's actions will be determined
9 under the business judgment rule).

10 The essential determination of whether the Individual
11 Defendants acted in "good faith", is a question of fact that
12 cannot be decided in the context of a motion to dismiss.

13 4. *Failure to plead fraud with particularity*

14 In the interest of judicial economy and given the
15 substantial similarity between the arguments of Alex Brown
16 and the Individual Defendants, the parties are referred to
17 section C(1) of this Order for a more thorough analysis on
18 this issue.

19 5. *Antecedent debt*

20 The parties are referred to the legal analysis
21 previously provided in this Order in section C(2) addressing
22 the preferential transfer allegations. However, the
23 following will set forth the relevant facts related to Beck
24 and Nadhir as to the preferential transfers.

25 On January 30, 1997, the Board of Directors for Boston
26 Chicken approved the formation of Progressive Food Concepts
27 (PFCI), a corporation in which Beck and Nadhir became owners
28 by investing approximately \$8,000,000.00. The purpose of

1 PFCI was to enter the "ready to eat" market via a concept
2 developed by Harry's Farmers Market (HFMI). To fund PFCI,
3 the Board approved a \$17,000,000.00 million convertible
4 secured loan to the new company.

5 On January 31, 1997, PFCI consummated a transaction
6 agreement with HFMI, wherein PFCI lent \$12,000,000.00 to
7 HFMI. PFCI also committed to loan an additional
8 \$8,000,000.00 to HFMI, which was later reduced to
9 \$5,500,000.00. In return, PFCI received all of HFMI's
10 technology and received a consulting contract with HFMI.

11 PFCI incurred substantial operating losses.
12 Nonetheless, the Board approved the payment of more than
13 \$8,000,000.00 (their investment plus interest) to Beck and
14 Nadhir for their shares in PFCI. Beck and Nadhir each
15 received \$1,000,000.00 in cash and a promissory note to each
16 of them in the amount of \$3,181,480.00, even though their
17 PFCI stock had no market value. Several months later, the
18 Board purchased Beck and Nadhir's remaining shares in PFCI,
19 by paying each of them \$345,147.17 plus a 50% repayment of
20 each of their PFCI notes, representing an additional
21 \$15,590,740.00. Beck and Nadhir were subsequently paid at
22 least one more interest payment on the PFCI notes in the
23 amount of \$38,199.85.

24 After the filing of the Boston Chicken Chapter 11
25 bankruptcy case and by mutual agreement, Boston Chicken
26 terminated the agreements they had with HFMI. As a result of
27 that settlement, as well as the funds paid to Nadhir and
28 Beck, Boston Chicken lost in excess of \$10,000,000.00 on the

1 PFCI transaction, and had no assets resulting on which
2 creditors could realize.

3 The Complaint also alleges that upon PFCI's formation,
4 Nadhir resigned as an officer of Boston Chicken and became
5 CFO of PFCI. Apparently, in connection with his
6 participation in PFCI, Nadhir built a house in southern
7 California at a cost of over \$2,500,000.00. Upon rejoining
8 Boston Chicken and selling his interest in PFCI, Nadhir was
9 reimbursed for expenses associated with his move including
10 the loss on the sale of his southern California house. As a
11 result of this arrangement, Nadhir received over
12 \$1,200,000.00 from Boston Chicken.

13 Finally, the Complaint alleges that after Nadhir's
14 resignation as Boston Chicken's CFO and Co-chairman of the
15 Board, he entered into a consulting agreement with Boston
16 Chicken. Pursuant to this agreement, Nadhir was to receive
17 \$400,000.00 per year in consulting fees. Nadhir received six
18 payments totaling approximately \$100,000.00.

19 The Complaint alleges, millions of dollars were
20 transferred to the Individual Defendants, without Boston
21 Chicken receiving a reasonably equivalent value in exchange
22 for these transfers, at a time when Boston Chicken was
23 insolvent. The Complaint further makes a *prima facie* showing
24 that such transfers were payments on an antecedent debt owed
25 by Boston Chicken, made while insolvent, and enabled Beck and
26 Nadhir to receive more than they would normally have received
27 if the transfers had not been made.

28

1 E. Underwriter Defendants' Motion to Dismiss Counts
2 XIV, XV, XVI and XVII

3 The Underwriter Defendants seek dismissal of Counts XIV,
4 XV and XVII on the basis of standing, judicial estoppel and
5 failure to state a claim.

6 1. Standing

7 The Underwriter Defendants' arguments related to
8 standing rely on the *in pari delicto* doctrine as argued by
9 Arthur Andersen and the *Williams* and *Caplin* cases as argued
10 by the Individual Defendants. As the Court has fully
11 discussed these issues above, the parties are referred to
12 sections B(1) and D(2), respectively, for the Courts
13 analysis.

14 2. Judicial estoppel

15 The Underwriter Defendants reiterate in their Motion to
16 Dismiss, the argument of judicial estoppel as asserted in the
17 Motion to Dismiss by "All Defendants", based on statute of
18 limitations.

19 The doctrine of judicial estoppel prevents a party from
20 gaining an advantage by taking one position, and then seeking
21 a second advantage by taking an inconsistent position at a
22 later time. See *Helfand v. Gerson*, 105 F.3d 530, 534 (9th
23 Cir. 1997).

24 The defendants attempt to take arguments made in support
25 of a motion to dismiss in defense of a class action lawsuit
26 in 1997 and use them against the Trustee in this matter.
27 However, the defendants fail to recognize that the Trustee
28 was not involved in making the arguments contained in the

1 1997 Motion to Dismiss. In 1997, the Individual Defendants
2 were a persuasive influence in the Company and the Trustee
3 argues that the arguments made were conceived in an effort to
4 cover-up the misconduct of the defendants.

5 Additionally, the Court notes the Underwriter
6 Defendants' reliance on Ninth Circuit precedent for judicial
7 estoppel, while arguing for the application of Colorado (10th
8 Circuit) law in all other respects. The Trustee aptly points
9 out that Ninth Circuit law should not apply under these
10 circumstances, as the *In re BCI* matter was filed in Colorado,
11 the Tenth Circuit.

12 The Tenth Circuit outright rejects the doctrine of
13 judicial estoppel. See *United States v. 49.01 Acres of Land*
14 *More or Less*, 802 F.2d 387, 390 (10th Cir. 1986); see also
15 *Parkinson v. California Co.*, 233 F.2d 432 (10th Cir.
16 1956) (reasoning that the adoption of judicial estoppel would
17 be out of harmony with the great weight of authority
18 independent of that rule, and would discourage the
19 determination of cases on the basis of the true facts as they
20 might be established ultimately). Accordingly, this Court,
21 using its discretion, declines to impose the doctrine of
22 judicial estoppel. See *New Hampshire v. Maine*, 2001 WL
23 567710 (U.S. May 30, 2001).

24 3. *Dismissal of the Tort Counts for failure to*
25 *state claim*

26 The parties agree that Colorado law applies to the
27 dismissal of the Torts Counts for failure to state claim.
28

1 a. Count XIV - aiding and abetting breach of
2 duty

3 Under Colorado law, the tort of aiding and abetting a
4 breach of duty requires that the following elements be met:

5 (1) breach by a fiduciary of a duty owed to plaintiff, (2)
6 defendant's *knowing* participation in the breach, and (3)
7 damages. *See Holmes v. Young*, 885 P.2d 305, 308
8 (Colo.Ct.App. 1994) (emphasis added).

9 The Underwriter Defendants take issue with the knowing
10 requirement. They claim that Boston Chicken signed numerous
11 documents verifying the "accuracy and integrity" of its
12 financial status, as a condition of the Underwriters
13 purchase, with each offering. The Underwriter Defendants
14 maintain that they are victims of Boston Chicken's
15 mismanagement. As such, they argue that as a matter of law,
16 they could not have known about the misrepresentations and
17 thus the *prima facie* case has not been met.

18 The Complaint, however, alleges that the Underwriter
19 Defendants knew that the information provided by the
20 Individual Defendants was false, and, further alleges that
21 the Underwriter Defendants were participating in the scheme
22 to further disseminate this information, to the detriment of
23 the Company. While the Underwriter Defendants present
24 compelling arguments as to what, if anything, they knew,
25 based on the verified financial documents, it would be both
26 premature and inappropriate for this Court to make such
27 factual determinations.

1 b. *Acting in concert*

2 Five elements must be met under Colorado law in order to
3 establish a civil conspiracy. See *Jet Courier Service, Inc.*
4 *v. Mulei*, 771 P.2d 486, 502 (Colo.1989). These five elements
5 are: (1) two or more persons, and for this purpose a
6 corporation is a person; (2) an object to be accomplished;
7 (3) meeting of the minds on the object or course of action
8 (4) one or more unlawful overt acts; and (5) damages as the
9 proximate result thereof. See *id.*

10 Similar to the above argument, the Underwriter
11 Defendants essentially argue that because Boston Chicken
12 verified the financial information provided, the Underwriter
13 Defendants could not, as a matter of law, have wrongfully
14 conspired to injure the Company.

15 As discussed above however, the Complaint alleges the
16 Underwriter Defendants knowingly participated in a scheme to
17 commit tortious acts against the Company by taking
18 information from the Individual Defendants knowing it to be
19 false and misleading and placing their imprimatur on it, in
20 furtherance of the scheme. As with the aiding and abetting
21 argument, the Underwriter Defendants' argument here also, is
22 based on factual, rather than legal insufficiencies in the
23 Complaint.

24 c. *Negligence*

25 "To recover on a claim for negligence, the plaintiff
26 must establish the existence of a legal duty on the part of
27 the defendants, breach of that duty by the defendant,
28

1 causation, and damages." *Davenport v. Community Corrections*,
2 962 P.2d 963, 966 (Colo. 1998).

3 The Underwriter Defendants claim that the *prima facie*
4 case for negligence has not been met because the relationship
5 between the parties arises out of a contract. Thus, the
6 Underwriter Defendants claim that Colorado tort law permits
7 tort claims only where the plaintiff can establish "[a]
8 breach of a duty arising independently of any contract duties
9 between the parties[.]" *Town of Alma v. Azco Construction*,
10 *Inc.* 10 P.3d 1256, 1263 (Colo.2000). In making this
11 argument, the Underwriter Defendants rely on the "economic
12 loss rule", as adopted by the Colorado Supreme Court in *Town*
13 *of Alma School*. 10 P.3d at 1264. The economic loss rule
14 states that the party suffering only economic loss from the
15 breach of an express or implied contractual duty may not
16 assert a tort claim for such a breach absent an independent
17 duty of care under tort law. See *id.*

18 However, the Underwriter Defendants fail to acknowledge
19 that professional negligence is one of those torts which are
20 expressly designed to remedy pure economic loss. See *Town of*
21 *Alma*, 10 P.3d at 1263; see also *Rian v. Imperial Mun. Serv.*
22 *Group, Inc.* 768 P.2d 1260, 1263 (Colo. App. 1988).

23 In Colorado, "for those practicing a profession
24 requiring specialized knowledge or skill, reasonable care
25 requires that actor to possess a standard of specialized
26 knowledge or skill, reasonable care in a manner consistent
27 with the knowledge and ability possessed by members of the
28 profession in good standing." *Corcoran v. Sanner*, 854 P.2d

1 1376, 1379 (Colo. App. 1993). The Complaint makes the *prima*
2 *facie* showing that the Underwriter Defendants failed to meet
3 these professional standards and the Company's reasonable
4 expectations.

5 d. *Negligent misrepresentation*

6 The Restatement (Second) Torts § 552 governs Colorado
7 claims for negligent misrepresentation. Section 552 provides
8 as follows:

9 (1) One who, in the course of his
10 business profession or employment, or in
11 any other transaction in which he has a
12 pecuniary interest, supplies false
13 information for the guidance of others
14 in their business transactions, is
15 subject to liability for loss caused to
16 them by their justifiable reliance upon
17 the information, if he fails to exercise
18 reasonable care or competence in
19 obtaining or communicating the
20 information.

21 (2)...the liability stated in subsection
22 (1) is limited to loss suffered (a) by
23 the person or one of a limited group of
24 persons for whose benefit and guidance
25 he intends to supply the information or
26 knows that the recipient intends to
27 supply it[.]

28 The Underwriter Defendants claim that the Trustee is
unable to satisfy any of the required elements of § 552. As
with their previous arguments, the Underwriter Defendants
fail to recognize that the Complaint alleges Boston Chicken
itself was a victim, in addition to the investing public.

Specifically, the Complaint alleges that, the
Underwriter Defendants, "knew, or absent reckless disregard
for the truth should have known, that the registration
statement for [Boston Chicken's] IPO and the materially false

1 misstated financial statements contained therein would be
2 provided to the board of Directors, the Audit Committee, the
3 creditors and the SEC." The Complaint makes similar
4 allegations with respect to the Underwriter Defendants
5 involvement in each of the offerings. The Complaint further
6 alleges that each of the misrepresentations and omissions in
7 those public offering documents related to the then-existing
8 material facts were false and misleading, and were made by
9 the Defendant Underwriters for financial gain, "expecting and
10 realizing that the Board of Directors and Audit Committee
11 would rely upon the misrepresentations and omissions." The
12 Complaint also alleges that the Underwriter Defendants made
13 these misrepresentations and omissions "for the purpose of
14 inducing the Board of Directors and Audit Committee to rely
15 upon them," and that the Board and Audit Committee were
16 unaware of the false nature of those misrepresentations
17 and/or omissions of material fact.

18 Based on the allegations set forth in the Complaint,
19 this Court concludes that the Trustee has adequately set
20 forth the necessary *prima facie* case for negligent
21 misrepresentation.
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1 F. Bell. Boyd & Lloyd's Motion to Dismiss Counts I and
2 II⁵

3 Defendant Bell, Boyd & Lloyd (hereinafter BB&L) move for
4 an Order dismissing Count I (breach of fiduciary duty) and
5 Count II (aiding and abetting breach of fiduciary duty) of
6 the Trustee's Complaint. Despite BB&L's argument for the
7 application of Illinois law, this Court will apply the
8 relevant Colorado law for its analysis of these claims.

9 1. Dismissal of breach of fiduciary duty and
10 aiding and abetting breach of fiduciary duty
 for duplication

11 In *Hanna v. Plummer*, the Supreme Court concluded that if
12 there is a federal rule of procedure covering a particular
13 point of practice or pleading in dispute, such rule governs
14 in a federal diversity action even if resorting to state law
15 would lead to a different result. 380 U.S. 460 (1965); see
16 also *Santana v. Holiday Inns*, 686 F.2d 736, 740 (1982).

17 BB&L moves to dismiss the breach of fiduciary duty and
18 aiding and abetting breach of fiduciary duty on the grounds
19 that such claims, under Illinois law, are duplicative of the
20 trustee's legal malpractice claim.

21 This argument is based on Illinois law, and the
22 procedural aspects of this matter are governed by federal
23 law. Federal Rule of Civil Procedure 8(e) permits the

24
25 ⁵ The Court notes that Trustee filed a separate Complaint against Bell,
26 Boyd & Lloyd as they refused to enter into a tolling agreement like the other
27 defendants. Accordingly, the Motion to Dismiss was filed under the bankruptcy
28 action, then transferred to District Court under case number 01-CV-246-PHX-ECH.
The matter was originally before Judge Carroll but consolidated with the *Smith*
v. Arthur Andersen action, 00-CV-218, before this Court. Accordingly, this
Motion to Dismiss references the Complaint and Counts I and II filed in the 01-
CV-246 matter.

1 assertion of alternative claims. "A party may set forth two
2 or more statements of a claim or defense alternatively or
3 hypothetically..." Fed.R.Civ.P. 8(e). Clearly, the Trustee
4 is permitted to make alternative allegations under federal
5 civil procedure and dismissal is not warranted on this basis.

6 2. *Aiding and abetting breach of fiduciary duty*

7 BB&L also argue that Count II, aiding and abetting
8 breach of fiduciary duty, should be dismissed because
9 Illinois law does not recognize this claim. As stated above,
10 this Court will use Colorado law for its analysis.

11 The Restatement (Second) of Torts § 876(b) states,
12 "[f]or harm resulting to a third person from the tortious
13 conduct of another, one is subject to liability if he knows
14 that the other's conduct constitutes a breach of duty and
15 gives substantial assistance or encouragement to the other so
16 to conduct himself." Colorado follows Restatement § 876(b)
17 and recognizes the claim for aiding and abetting a breach of
18 fiduciary duty. *See Homels v. Young*, 885 P.2d 305 (Colo.
19 App. 1994) (adopting Restatement (Second) of Torts § 876;
20 recognizing aiding and abetting breach of fiduciary duty
21 claim in a limited partnership situation); see also *Q.E.R. v.*
22 *Hickerson*, 880 F.2d 1178 (10th Cir. 1989) (finding that claim
23 of aiding and abetting breach of fiduciary duty would be
24 recognized in Colorado); *Alexander Co. v. Packard*, 745 P.2d
25 780, 782 (Colo.App. 1988). Based on the foregoing the claims
26 against BB&L will remain pending before this Court.

27 IT IS ORDERED that Arthur Andersen's Motion to Dismiss
28 Counts VIII, IX, X, XI and XII (Doc. 44) is DENIED.

1 IT IS FURTHER ORDERED that Alex Brown/Deutsche Banc's
2 Motion to Dismiss Counts XVIII and XIX (Doc. 51) is DENIED.

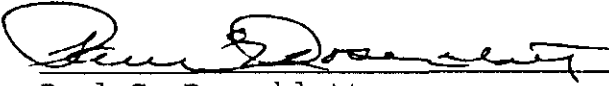
3 IT IS FURTHER ORDERED that the Motion to Dismiss filed
4 by all defendants on statute of limitations grounds (Doc. 56)
5 is DENIED.

6 IT IS FURTHER ORDERED that the Underwriter Defendants'
7 Motion to Dismiss Counts XIV, XV, XVI and XVII (Doc. 57) is
8 DENIED.

9 IT IS FURTHER ORDERED that the Individual Defendants'
10 Motion to Dismiss (Doc. 58) is DENIED.

11 IT IS FURTHER ORDERED that Bell, Boyd & Lloyd's Motion
12 to Dismiss is DENIED.

13 DATED this 5th day of Dec, 2001.

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16 Paul G. Rosenblatt
17 United States District Judge
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